

Protest of	)	Date: May 21, 1991
	)	
FLAMENCO AIRWAYS, INC.	)	
	)	
Solicitation No. RASYS-91-01	)	P.S. Protest Nos. 91-21

### DECISION

Flamenco Airways, Inc. (Flamenco) timely protests the contracting officer's award to Four Star Aviation, Inc. (Four Star) of a contract under solicitation no. RASYS-91-01. The solicitation, issued by the Air Contracts Management Division, Postal Service Headquarters, on January 7, 1991, requested proposals from regional carriers<sup>1/</sup> for transportation on the carriers' systems at a fixed line haul rate while permitting offerors to propose a terminal handling rate. The solicitation established the following three qualifications:

- (1) The offeror must be a regional carrier within the meaning of the solicitation's definition;
- (2) The offeror must have a valid Federal Aviation Administration (FAA) operating certificate under either Part 121 or Part 135 of Title 14 of the Code of Federal Regulations for the operation of the type of aircraft and service offered.
- (3) The offeror must not be a contractor with the Postal Service under Contract No. ASYS 91-01.

The solicitation provided that the Postal Service would purchase an indefinite quantity of air transportation between points served by the contractor's system.<sup>1/</sup> The only

<sup>1/</sup> The solicitation defines "regional carrier" as:

[A]n air carrier engaged in the transportation of passengers and/or cargo whose average length of haul is under 500 miles. Average length of haul is determined by calculating the great circle miles flown over the air carrier's entire system, as defined [elsewhere in the solicitation], from each origin to each ultimate destination divided by the carrier's total number of flights. For the purpose of determining a carrier's total number of flights, transportation from an origin to an ultimate destination will constitute a single flight.

<sup>2/</sup> The solicitation defined contractor's system as:

[T]he contractor's entire domestic flight schedule as determined by the schedules published in the Official Airline Guide and by other schedules the contractor provides the Official Airline Guide for exclusive distribution to the Postal Service....

criterion for award was price:

The Postal Service will award a contract or contracts resulting from this solicitation to the responsible offeror or offerors whose proposal or proposals conforming to the solicitation will offer the most advantageous price or prices to the Postal Service.

Solicitation, p. vi., Contract Award. The solicitation indicated that the Postal Service intended to award multiple contracts, so that multiple carriers might serve particular origin-destination pairs. In tendering mail to awardees in those situations, consideration would be given to the cost of transportation as established by the rates offered by offerors. Proposals were to be received by January 22, 1991, and the contract term was to begin February 9, or such later date as might be ordered by the contracting officer, through February 5, 1993.

Both Four Star and Flamenco submitted proposals in response to the solicitation and both were found acceptable and awarded contracts on January 25, when the contracting officer executed the modified PS Form 7405, styled "Air Transportation Service Proposal and Contract," submitted with their proposals.<sup>17</sup> Both carriers serve Puerto Rico and various points in the U.S. Virgin Islands.

On March 4, Flamenco provided its protest of award (to Four Star) to the contracting officer, who forwarded it to this office for resolution. The protest alleges that when Four Star submitted its proposal it did not meet the first contractor qualification required by the solicitation. Flamenco apparently contends that Four Star's Part 135 certificate does not allow it to publish schedules and therefore Four Star cannot qualify as a

<sup>31</sup> The referenced PS Forms 7405 are not dated. Although the contracting officer states that offerors were informed of award by February 9 or later, the record does not reflect when or how offerors were informed of the contract awards. Procurement Manual (PM) 4.5.1 i. states with respect to notification of award under negotiated solicitations such as this:

**i. Award Notification**

1. Promptly after award, the contracting officer must send all offerors that submitted proposals a written notice including:

- (a) The number of proposals received;
- (b) The name and address of each offeror receiving an award;
- (c) The items, quantities, and unit prices of each award, or total of estimated cost and fee for cost-reimbursement contracts;
- (d) If award was made without discussions a statement to that effect; and
- (e) A brief statement of the basis for the selection decision.

2. If numerous multiple awards are made, the notice may state where award details may be reviewed.

This provision is applicable to the award of mail transportation contracts. PM Exhibit 12.1.1.

regional carrier since that status depends on its publishing in the Official Airline Guide (OAG), or supplying to the OAG for exclusive distribution to the Postal Service, schedules from which the average length of flights on its system may be calculated.<sup>4/</sup> The protest indicates that Flamenco is requesting the FAA and Department of Transportation (DOT) to investigate the matter of Four Star's compliance with the requirements of its certificate.

By a letter dated March 15, Flamenco has amplified its March 4 protest. Flamenco restates that the Four Star's Part 135 certificate restricts it to on-demand cargo service only and the provision of schedules to the OAG for exclusive distribution to the Postal Service exceeds this operating restriction. Flamenco also raises several new issues regarding Four Star's non-compliance with various of the requirements of the regulations governing Air Taxi Operations, set out at 14 CFR Part 298. Flamenco alleges:

- Four Star is not a commuter air carrier within the meaning of 14 CFR '298.2(f) because it does not carry "passengers on at least five round t[r]ips per week on at least one route between two or more points according to its published flight schedules that specify the times, days of the week, and places between which those flights are performed" (language quoted from the regulation).<sup>1/</sup>

- Four Star's Form 298-A, Air Taxi Operator and Commuter Carrier Registration and Amendments Under Part 298 of the Economic Regulations of the Civil Aeronautics Board, does not list mail carriage as a type of service that Four Star proposes to offer as required by 14 CFR '298.21(c)(1)(iv).

- Four Star's failure to amend its Form 298-A to reflect mail carriage within 30 days of its change in operations to include mail carriage (required by 14 CFR '298.23(a)(2)) makes its registration subject to cancellation pursuant to 14 CFR '298.24(c).

- Four Star does not have the liability insurance required by 14 CFR "298.37 and 298.41.

In his report on the protest, the contracting officer responds to both the March 4 and March 15 Flamenco submissions. The contracting officer views Four Star as having an appropriate operating certificate for the service offered. Further, Four Star has provided schedules to the OAG; based on those schedules he has determined Four Star to be a regional carrier. The contracting officer states that a staff lawyer for the FAA's Chief Counsel's Office has indicated to Postal Service assigned counsel that a carrier limited to on-demand cargo service could publish schedules in the OAG for Postal Service exclusive use without violating its operating specification. The contracting officer explains that the solicitation requirement allows the OAG to include

<sup>4/</sup> Clause 1, section XIV and special provision 23 of the solicitation require the prospective awardee either to publish schedules in the OAG or to provide schedules to the OAG for exclusive distribution to the Postal Service.

<sup>5/</sup> Flamenco offers no basis for its contention that Four Star needs to meet this definition.

the schedules on its computerized schedule of all air service which is then transferred to the Postal Service in disk format for use in the Postal Service's computerized air schedule system.

The contracting officer adds that the remainder of Flamenco's arguments are either not relevant or are mere allegations. Flamenco's argument that Four Star fails to meet the requirements of a commuter air carrier is not relevant because Four Star is an all cargo carrier subject to the exemptions in 14 CFR 291 et seq. Flamenco has failed to provide any evidence that Four Star does not comply with other regulations and since Four Star continues to hold a valid certificate one should conclude it is in compliance with applicable regulations. The contracting officer further states that award of a contract to Four Star was proper.

Lastly, the contracting officer alleges that Flamenco's protest is untimely, given that the March 4 protest followed award on January 25, far more than 15 working days after contract award.<sup>17</sup>

Both Four Star and Flamenco submitted comments on the contracting officer's statement. Four Star points out that it is a certificated cargo carrier and that nothing related to its status precludes it from providing schedules to the OAG in compliance with the requirements of the solicitation for a regional carrier and that it otherwise meets all of the contractor requirements.

Flamenco argues that its protest is timely noting that the contracting officer's statement that award was made on January 25 does not reflect the fact that he admits that he did not inform the awardees of award until February 9 or later. In its own case, Flamenco states that it did not learn of award to Four Star until February 26, and confirmed February 28 that Four Star would be beginning service on March 2. Flamenco argues its protest challenging award to Four Star is timely as measured from these dates.

Flamenco also takes exception to the contracting officer's statement that Four Star is an all cargo carrier subject to the exemptions of 14 CFR Part 291. Flamenco states that it has confirmed with DOT that Four Star is, rather, an on-demand cargo carrier under Part 298. Flamenco reiterates its claim that Four Star's status as an on-demand cargo carrier precludes it from publishing schedules, and disputes the contracting officer's position to the contrary as insufficiently attributed to an unidentified FAA staff attorney. Finally, Flamenco reiterates its claim that Four Star's failure to have amended its registration with the DOT subjects its registration to cancellation.

Both the contracting officer and Four Star have replied to Flamenco's comments. Four Star argues that Flamenco's protest is untimely because once it received notice of its award, Flamenco was on notice to inquire concerning any other awards made pursuant to the solicitation, noting that the actual date on which Flamenco learned of the award

<sup>17</sup> PM 4.5.4 d. states:

...protests must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question.

is not crucial under the regulation's "knew or should have known" standard.<sup>1/</sup> Additionally, Four Star submits evidence that it has amended its registration with DOT to reflect its carriage of mail and other evidence reflecting the FAA's confirmation that it need not change its Part 135 operation specification in order to carry mail.<sup>1/</sup>

In final comments, the contracting officer indicates that he was in error in identifying Four Star's status as a Part 291 carrier, agreeing that Four Star is a Part 298 Air taxi Operator. The contracting officer indicates that Postal Service counsel has confirmed with the FAA that an air taxi operator with operating specifications limiting it to on-demand cargo operations may transmit private schedules to the Postal Service through the OAG.

### Discussion

We must first determine the timeliness of the protest. As we have previously noted;

We are without authority to consider a protest which is untimely. Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. Even where actions of the contracting officer have contributed to the untimeliness of a protest, our past decisions have been to the effect that the timeliness standard cannot be ignored.

A few cases, however, can be read as exceptions to this general rule. In Hydralifts, Inc., [P.S. Protest No. 75-41, November 3, 1975] we held that the failure to notify the protester of the contract award in accordance with the [applicable procurement regulation] procedures tolled the timeliness period from running and allowed consideration of a protest filed more than 15 days after award. In H.L. Yoh Company, P.S. Protest No. 73-6, July 6, 1973, the contracting officer's advice to the protester to submit the details of its protest by a specified time was found sufficient to make timely a protest submitted within the time prescribed, but otherwise untimely. In Recognition Equipment Incorporated, P.S. Protest No. 81-52, December 17, 1981, the "casual, nonfinal, nondeliberate" actions of the contracting officer were insufficient to start the running of the protest timeliness periods.

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We resolve the conflict between these two lines of decisions by upholding the narrow principle on which Hydralifts, Inc. is based; when the contracting officer,

<sup>1/</sup> Four Star does not state when it received notice of its award, nor does it allege a specific date when Flamenco should have known of award. As noted, the record offers no evidence which resolves this issue.

<sup>8/</sup> Four Star has submitted a declaration concerning an April 10 meeting it had in San Juan, Puerto Rico with the principal FAA operations inspector with oversight authority over Four Star. In that meeting, the inspector confirmed that Four Star did not have to alter its Part 135 operation specifications in order to carry mail. In addition, the inspector stated that the FAA was not concerned with the regulation of schedules which Four Star might establish with the Postal Service pursuant to a contractual agreement to carry mail.

in violation of the regulatory provisions governing notice of award, makes the filing of a timely protest impossible, the running of the timeliness period is tolled until the protester knows or should have known of the award. This is not inconsistent with our other statements that neither the contracting officer nor our office can waive the timeliness standard, but provides a remedy for a protester who, with due diligence and through no fault of its own, is rendered completely unable to file a timely protest by the improper actions or omissions of the contracting officer.

American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (Citations and footnote omitted.). This protest falls within the narrow exception. Here, there is no evidence that the contracting officer informed offerors of contract award in accordance with the requirements of PM 4.5.1 i. As a result, Flamenco was unable to comply with the timeliness requirements of the PM. Four Star's argument that an offeror has constructive notice to inquire regarding award does not apply when an offeror has a justifiable basis for relying on the contracting officer giving notice of award pursuant to postal procurement regulations. Hydralifts, Inc., supra. Thus, Flamenco's March 4 protest is timely.

Turning to the substantive issues raised by Flamenco's protest, Four Star's compliance with the qualification requirements of the solicitation is governed by the standards applicable to special criteria of responsibility (definitive responsibility criteria). DHL Airways, P.S. Protest No. 89-36, July 7, 1989; PM 3.3.1 c. and 12.5.1 c. While ordinarily a contracting officer's affirmative determination of responsibility is not subject to review, an exception exists when the contracting officer has failed to apply definitive criteria of responsibility properly. Haughton Elevator Division, Reliance Electric Company, Comp. Gen. Dec. B-184865, 55 Comp. Gen. 1051, 76-1 CPD &294.

Here, Flamenco challenges Four Star's authority to issue schedules for inclusion in the OAG in order to meet the solicitation's requirement that offerors be regional carriers. If a protestor alleges misapplication of definitive responsibility criteria, our review involves determining whether the contracting officer had before him information from which he reasonably could have determined the criteria were or were not met. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990. Evidence has been submitted by the contracting officer which reasonably indicates that Four Star meets the solicitation requirement that awardees be regional carriers. The FAA has stated that Four Star could transmit private schedules to the Postal Service through the medium of the OAG. Such schedules were provided to the OAG and based on those schedules the contracting officer has determined Four Star to be a regional carrier. The record before us, therefore, supports the contracting officer's determination that Four Star met this definitive responsibility criterion. Gage Constructors, P.S. Protest No. 87-11, July 13, 1987. Moreover, Flamenco has not presented any evidence which would lead this office to overturn that determination. Id.

The other issues raised by Flamenco have to do with the applicability of, and Four Star's compliance with, DOT regulations governing Four Star's operating certificate. DOT has responsibility to enforce its regulations. It is the appropriate party to examine Flamenco's allegations and to take appropriate action as necessary. See generally, Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986.

The protest is denied.

**[Signed]**

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[Compared to original 5/16/95 WJJ]**